

Byers Engineering Corp. and Local 1049, International Brotherhood of Electrical Workers, AFL-CIO, Petitioner. Case 29-RC-8711

October 15, 1997

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered determinative challenges in an election held December 31, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows seven for and six against the Petitioner, with four challenged ballots, a number sufficient to affect the results.¹

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings² and recommendations only to the ex-

¹ The Regional Director issued an order and notice of hearing on February 13, 1997, recommending that the challenges to the ballots of Anthony Pubins and John Main be deferred pending the outcome of investigations of unfair labor practice charges pertaining to Pubins and Main, and that a hearing be held for the purpose of resolving the issues raised by the challenges to the ballots of Michael Hennessey and William Wett. The Regional Director also recommended that all of the Employer's objections be overruled. In an order dated March 20, 1997, the Board adopted the recommendations of the Regional Director.

² We agree with the hearing officer, for the reasons set forth in her report, that the challenge to the ballot of Michael Hennessey should be overruled.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In adopting the hearing officer's credibility resolutions, however, we do not rely on the negative inference she drew from the Employer's failure to present Supervisor Louis Simone to corroborate William Wett's testimony. We note that the burden of proof in this case rests on the Petitioner as the party asserting Wett's supervisory status.

Member Higgins agrees with his colleagues, albeit under a different rationale, that Hennessey's ballot should be counted. Member Higgins agrees with former Member Cohen's dissent in *Vanalco, Inc.*, 315 NLRB 618 (1994), that the appropriate standard for determining the eligibility of an employee on sick or disability leave at the time of the election is whether the employee has a reasonable expectancy of return and not—as set forth by the *Vanalco* majority—whether the employee had quit or been discharged as of the election. Member Higgins further finds, however, that under either test Hennessey was eligible to vote.

As to the "reasonable expectancy" test, Member Higgins notes that Hennessey had returned to work in the fall of 1996 following an earlier back injury, and thereafter worked for the Employer until reinjuring his back in early December 1996. On December 4, Hennessey presented the Employer with a doctor's note stating that he was disabled from performing work until January 2, 1997. On December 30—the day before the election—Hennessey presented the

tent consistent with this Decision, Direction, and Order.

The hearing officer found, *inter alia*, that William Wett is a supervisor within the meaning of Section 2(11) of the Act and recommended that the challenge to his ballot be sustained. The Employer excepts, contending that Wett is a leadman who does not have authority to exercise independent judgment in connection with his duties. For the reasons set forth below, we find merit in the Employer's exception.

The Employer is under contract with utility companies in Long Island, New York, to locate and mark out underground gas, electric, water, and telephone lines in order to assist companies to avoid damaging the utilities in the process of excavation. The Petitioner seeks to represent 18 locators, whose responsibilities are to verify and mark the location of utility lines by using electronic equipment or by visual inspection through a manhole.

The Employer's Long Island operations are composed of two divisions: Suffolk County and Nassau County. Each county is further subdivided into six geographic areas. One or two locators are assigned to perform work within each geographic area. Hugo Berntsson manages the Employer's operations in Long Island. Louis Simone supervises locators in both counties and reports to Berntsson. William Wett is the lead locator in Nassau County and reports to Simone.

Like the Employer's other locators, Wett is an hourly employee.³ As one of the Employer's most experienced locators, he trains new employees and conducts quality audits of their work in addition to performing locating work of his own. He shares responsibility for training and conducting audits with at least two other senior locators whose ballots were not challenged.

In the morning before work commences, Wett reviews the work in Nassau County to determine if it is evenly distributed among the locators. If he finds that there is too much or too little work in any locator's assigned area, he shifts and reassigns cases in order to equalize the work load. The record does not disclose who makes the initial assignment of locators to a particular geographic area of the county.

Employer with an updated doctor's note stating that Hennessey was "totally temporarily disabled until January 13, 1997."

On these facts, where Hennessey previously had returned to work after a back injury, and where the duration of his current disability was brief and was predicted to end shortly after the election, Member Higgins finds that Hennessey had a reasonable expectancy of returning to work. Member Higgins has considered Hennessey's December statement to Manager Berntsson that Hennessey would be undergoing further tests to determine whether surgery was required and that "based on the type of the injury and surgery, that he would—he would not be able to be a locator." This evidence does not warrant a contrary result. The statement is necessarily speculative as to such medical questions as whether there would be surgery and what the outcome of any such surgery would be."

³ Berntsson and Simone are both salaried.

Wett also serves as the Employer's center of communication in Nassau County. Utilities and contractors contact Wett with service questions in the county and employees contact Wett if they experience problems such as equipment failures.

The hearing officer found that the Petitioner failed to show that Wett has authority to hire, suspend, lay off, recall, promote, discharge, reward, transfer, independently discipline employees, or effectively recommend such action. Nevertheless, she found Wett is a 2(11) supervisor because Wett exercises independent judgment in assigning, adjusting, and directing the work of the Employer's Nassau County locators. The hearing officer principally relied on Wett's role in training other locators and monitoring their performance. From this, she inferred that Wett assigns work based on the locators' relative skills. The hearing officer additionally relied on locator Michael Hennessey's testimony that he argued with Wett over an assignment in the Rockaways which interfered with his ability to attend his doctor's appointments. Based on Hennessey's testimony, she found that Wett took into consideration Hennessey's medical condition in assigning him work. She also relied on the impact of Wett's assignments on employee bonuses.

Contrary to the hearing officer, we find that, although Wett has some authority to make and adjust assignments and to direct the work of other locators, the record does not establish that Wett uses independent judgment in exercising this authority. Thus, although Wett's training and monitoring functions provide him with significant opportunity to compare employees' skills, the Petitioner did not present any evidence that Wett selects employees to perform work based on his judgment of their skills. Further, with regard to Hennessey's Rockaways assignment, Hennessey's testimony does not indicate that Wett independently assigned him to the Rockaways or that his medical condition was a factor in that assignment.⁴ The *only* factor which the record indicates plays a part in Wett's decision to shift or reassign work is the equitable distribution of the workload. The Board has consistently found that assignments made to equalize employees' work are routine and do not require the exercise of independent judgment. *Ohio Masonic Home*, 295 NLRB 390, 395 (1989); and *Providence Hospital*, 320 NLRB 717, 727 (1996).

Similarly, we find no support in the record for the hearing officer's finding that Wett's reassignment of

work affects employees' incentive bonuses. The Employer awards two types of incentive bonuses. One is based on consecutive jobs performed successfully; that is, on consecutive jobs in which there is no damage to utilities. The other is based on having perfect attendance, no tardiness, no damages and no accidents for a month. Thus, a locator's attendance, punctuality, and skill determine whether a locator will earn an incentive bonus and the amount of the bonus.⁵

Furthermore, we find no record support for the hearing officer's finding that Wett exercises independent discretion in directing the work of other locators. Locators essentially work alone and unsupervised. On occasion, Wett inspects the work of other locators and reports the results to Simone. There is no evidence that his reports include recommendations. Moreover, the record indicates that he does not provide feedback directly to other locators concerning deficiencies in their work, unless instructed to do so by Simone. Under these circumstances, Wett's auditing function appears to be merely reportorial and does not connote supervisory authority and responsibility. *Hogan Mfg.*, 305 NLRB 806, 807 (1991); and *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988).

The hearing officer also found Wett's supervisory status was supported by the testimony of several locators that, if they encountered unusual problems in the field, they called Wett for help and advice. The only specific problem identified by the locators which would prompt a call to Wett, however, was a broken down truck or some other equipment failure. Wett's help in such instances, based on seniority and experience, does not establish supervisory status. Even assuming it involves the exercise of independent judgment within the meaning of Section 2(11), it is well established that such isolated or sporadic exercise of authority is insufficient to establish supervisory status. *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

In sum, we conclude that the Petitioner has not met its burden of establishing that Wett is a supervisor as defined in the Act. As both the Board and the courts have recognized, an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), *enfd.* in relevant part 794 F.2d 527 (9th Cir. 1986). The decisive factor is whether the employee possesses the authority to use independent judgment with respect to the

⁴Hennessey testified, "I had an argument with the supervisor that were [sic] going to send me into the Rockaways and that's when Hugo Bertsson decided maybe I'd be better off, I should stay in the office. . . . It seems Byers had a policy that they would send me to the farthest points of Long Island. . . . My question to them was, I could not make these appointments, the doctor's appointments, while they were sending me where I have to drive two-and-a-half hours to and from a job."

⁵The hearing officer relied on locator Brian Johnson's testimony that Wett's reassignment of work could impact earnings, "[o]nly by the—incentive, which is a bonus that you get for doing X amount of jobs. But I couldn't see—I couldn't see it really affecting it, that as long as he kept having steady work." We find that Johnson's testimony is inconclusive and fails to support the hearing officer's inference that Wett's reassignment of work affects employees' incentive bonuses.

exercise of one or more of the specific authorities listed in Section 2(11). *Id.* In analyzing Wett's role in training other locators, altering their assignments in order to equalize the workload, monitoring employee performance, and serving as a center for communication, we find that in each instance the authority exercised does not involve the use of independent judgment, but rather involves routine decisions typical of leadman positions and other minor supervisory employees that are found by the Board not to be statutory supervisors. See, e.g., *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 467 (1995); *North Shores Weeklies*, 317 NLRB 1128 (1995); and *Brown & Root, Inc.*, 314 NLRB 19, 21–22 (1994).⁶

⁶Member Higgins agrees with his colleagues that the challenge to the ballot of William Wett should be overruled. Although Member Higgins finds that an individual who assigns work based on such subjective factors as employee skills, patient needs, and employee preference is quintessentially engaged in the exercise of independent judgment, he agrees with his colleagues that the instant record does not support such a finding as to Wett.

Accordingly, we overrule the challenges to the ballots of Michael Hennessey and William Wett and shall direct that their ballots be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 29 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Michael Hennessey and William Wett, and serve on the parties a revised tally of ballots. In the event the Petitioner receives a majority of votes cast and the remaining challenged ballots are not determinative, a certification of representative shall issue.

IT IS FURTHER DIRECTED that should the revised tally of ballots indicate that the remaining challenged ballots are determinative, any certification shall be held in abeyance pending resolution of the challenges to the ballots of Anthony Pubins and John Main.

ORDER

It is ordered that this matter be remanded to the Regional Director for Region 29 for further processing consistent with this decision.